

Attorney Docket No.: J6855(C)
Serial No.: 10/730,709
Filed: December 8, 2003
Confirmation No.: 3982

REQUEST FOR REHEARING

under 37 CFR § 41.52

for Appeal 2010-004813

Sir:

In response to the Decision on Appeal with a notification date of July 26, 2010, please enter the following Request for Rehearing on the above-identified application as follows. The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

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Appellants note the Board's remark that "Appellants provide no evidence to support the argument (of teaching away) and we see none in our review of Farrell." (Decision on Appeal 6). Appellants respectfully submit that the Honorable Board either misapprehended or overlooked Appellants specific argument that Farrell teaches away from reducing the degree of intimate contact of the dry reactive materials by suspending them in the anhydrous carrier required in claim 1(c) (App. Br. 8). Appellants specifically cited Farrell's teaching "that the desired result of the rapid effervescence created by the intimate blend being contacted with water is the production of "copious" lather." (App. Br. 8 and Farrell, et al., col. 1, lines 57-58). In other words, the skilled person would only not have been motivated to reduce the intimate contact of the dry powder in Farrell, et al., by suspending such powder in an inert medium but would have been discouraged to do so because the skilled person understands that reducing the intimate contact of reactive materials shows their reaction and concomitantly the production of effervescence in and the production of lather, i.e., lack of "copious" lather. In re Fulton, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

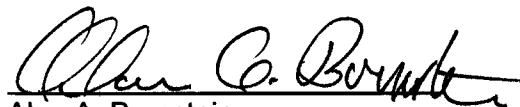
The skilled person reading Farrell, et al., would understand the necessity to achieve intimate contact between the dry reactive ingredients both from the specific description "The effervescent composition is an intimate mixture of an acid material such as citric acid and an alkaline, material such as sodium bicarbonate" (Id. see abstract and Examples 1 to 5 which all require dry blending in a high speed shearing mixer). Moreover, the skilled person would understand that the reactive dry blend of Farrell, et al., is primarily a combination of reactive ingredients with minimal dilution with other materials (i.e., greater than 70% by wt., see Examples 1-5). A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc., v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984, MPEP 2142.02 (VI)). Appellants respectfully submit therefore that Farrell, et al., would have discouraged/taught away from the pending claims on appeal according to appellant's brief (App. Br. 8).

In summary, Appellants respectfully submit that that Honorable Board of appears to overlook the fact Farrell discourages the use of suspending reactive materials in an anhydrous medium as would be apparent to the skilled person reading Farrell and its teaching of copious lather and finely divided particles in intimate contact with each other. In view of the above, Appellants respectfully submit that a proper rejection under 35 U.S.C. § 103(a) has not been made. Accordingly, reconsideration of the Honorable Board's decision is appropriate and is courteously solicited.

CONCLUSION

Appellants respectfully request the Honorable Board of Patent Appeals and Interferences reverse the Decision on Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan A. Bornstein", is written over a horizontal line.

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